For suits against the United States, the statute of limitations is similarly an expression of sovereign immunity—a limitation on its consent to be sued. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 93-94 (1990); *Harrell v. Fleming*, 285 F.3d 1292, 1293 (10th Cir.), *cert. denied*, 537 U.S. 1057 (2002). Under *Armstrong*, Congress's decision to render petitioners' claims unenforceable with a limitations bar is therefore precisely equivalent, for Takings purposes, to repudiating the obligations themselves.

4. The opposition argues that statutes create enforceable rights only if there is "'some clear indication that the legislature intends to bind itself contractually.'" Opp. 16 (quoting *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-66 (1985)). It insists that "nothing in Section 640 expresses an intent by Congress to bind itself by conferring vested property rights on petitioners." Opp. 17.

That assertion misses the point. The vested rights in this case were created not by Section 640 but by the statutes promising petitioners wages, including FLSA overtime, in exchange for their labor. Those rights became vested contractual obligations under *Fisi* once the work was performed. Section 640 was a promise to honor those existing obligations despite expiration of the limitations period—which, under the common law of contracts, need not separately satisfy the requirements for a binding contract.

5. The remainder of the Takings analysis in the brief in opposition simply argues that the Federal Circuit was correct on the merits, and illustrates precisely why this Court's intervention is essential. It argues (Opp. 17) that the Federal Circuit's "fund of money" distinction was not just an interpretation of *Eastern Enterprises*, but was dictated by a footnote in *United States v. Sperry Corp.*, 493

U.S. 52, 62 n.9 (1989), which noted that "[u]nlike real or personal property, money is fungible." But the holding of *Sperry* is that reasonable user fees are not Takings. This Court did note that laws imposing obligations to pay money cannot all be Takings, which is surely correct. But the United States's suggestion that *Eastern Enterprises* simply "reiterated that conclusion" by "determining that a mere obligation to pay an undifferentiated amount of money, not drawn from a specifically identifiable fund, is not property for purposes of the Takings Clause," Opp. 17-18, is absurd. *Eastern Enterprises* contains no holding at all; *none* of its various opinions can fairly be read that way; and that generalization is both incoherent and squarely foreclosed by this Court's holdings in (at least) *Lynch* and *Perry*. Pet. 20-26. Even if the Federal Circuit was right in *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 1096 (2002), that laws *imposing* monetary obligations on private parties cannot be Takings, that would not justify the further step taken in this case—that laws *abrogating* monetary obligations owed to private parties by the United States are not Takings. *Lynch* and *Perry* hold that they are. Like the Federal Circuit, the United States has missed the real distinction in this Court's cases—which is between laws imposing new obligations to pay money in the service of some regulatory objective, and laws confiscating specific, pre-existing monetary obligations for the government's use. *Id.* The latter *are* Takings.

The United States argues that the petition overstates the Federal Circuit's holding, because the Federal Circuit conceded that "*contractual* obligations are ordinarily property." Opp. 19. Of course that concession is enough to resolve this case, since petitioners' rights *are* contractual under *Fisk*. Regardless, the suggestion that monetary

obligations are property only if they are either "contractual" or relate to a "specific identifiable fund" will not stand up. Could the United States confiscate workers' compensation benefits owing to an individual, or one person's *quantum meruit* obligation to pay another for the fair value of goods or services received? And there is no obvious "fund" in dispute in this case only because the United States has defied its obligations and left petitioners' wages commingled in the Treasury. Pet. 25. The only sensible rule is that vested monetary debts are property, period.

6. The opposition concedes the circuit split over whether *Eastern Enterprises* contains any holding of this Court, but argues that the split is irrelevant because the Federal Circuit and First Circuit have relied on *Eastern Enterprises* only "for principles that were already settled," presumably by *Sperry*. Opp. 21. That is wrong for reasons already explained. The Federal Circuit has extrapolated an elaborate new jurisprudence of monetary Takings from misunderstood language in the concurring and dissenting opinions in *Eastern Enterprises*. Surely a conflict over whether that case is precedential at all merits review.

7. The United States suggests that "[t]he practical significance of this case is likely limited to government employees," Opp. 27, as if that were a reason to deny review. The United States employs nearly four million people on statutory terms, with a total payroll of nearly $200 billion annually. Even if the Federal Circuit's holdings *were* relevant only to federal employees (which is not true), this case would have enormous national significance.

CONCLUSION

The petition for certiorari should be granted in its entirety, or this petition and the one filed in 04-1226 should be granted together and consolidated for argument.

Respectfully submitted,

JULES BERNSTEIN
LINDA LIPSETT
BERNSTEIN & LIPSETT, P.C.
1920 L ST., N.W., SUITE 303
WASHINGTON, D.C. 20036

EDGAR JAMES
JAMES & HOFFMAN, P.C.
1101 17TH ST., N.W., SUITE 510
WASHINGTON, D.C. 20036

RICHARD P. BRESS
Counsel of Record
J. SCOTT BALLENGER
JONATHAN C. SU
LATHAM & WATKINS LLP
555 11TH STREET, N.W.
SUITE 1000
WASHINGTON, D.C. 20004
(202) 637-2200